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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 595

BETHLEHEM STEEL COMPANY
(SHIPBUILDING DIVISION),
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INDUSTRIAL UNION OF MARINE AND
SHIPBUILDING WORKERS OF AMERICA,
AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 31, 1963.

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Petitioner Bethlehem Steel Company (the "Company") prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Third Circuit, entered in these actions on August 21, 1963.

Opinions Below

The Decision and Order of the National Labor Relations Board (together with the Trial Examiner's Intermediate Report), and the Supplemental Decision and Order of the Board are printed at pages 3a-87a and 87a-97a, respectively, of the accompanying Joint Appendix and are reported at 133 N.L.R.B. 1347 (1961)

and 136 N.L.R.B. 1500 (1962), respectively. The opinion of the court of appeals denying enforcement of the Board's order and remanding the case to the Board for further proceedings in accordance with the court's opinion is printed as Appendix A hereto*, and is reported at 320 F.2d 615 (1963).

Jurisdiction

The decree of the court of appeals was entered on August 21, 1963 (Appendix B). The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act ("Act"), 29 U.S.C. 160(e) and 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Company's proposal that grievances to be handled (exclusively by Union representatives) in the grievance procedure be signed by the employees involved was a non-mandatory subject of bargaining under the Act; and, if so, whether the Company violated Section 8(a)(5) of the Act by failing to withdraw this proposal before the negotiations reached an impasse, although the Union did not then contest the Company's legal right to make the proposal and the Trial Examiner found that the proposal "was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it." (75a).

2. After the prior labor agreement expired and the Company lost the benefit of the Union's no-strike commitment, whether the Company was required to bargain

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*Page references to Joint Appendix are indicated by "a"; page references to accompanying Appendix A are indicated by "App."

with the Union before temporarily suspending superseniority for Union officials and certain grievance handling privileges solely for the purpose of putting economic pressure on the Union; and, if so, whether the Company satisfied that obligation by giving the Union prior notice of those changes and affording it opportunity to discuss the matter.

3. Whether the Company committed a *per se* violation of Section 8(a)(5) of the Act by putting into effect its proposals to the Union, after giving the Union notice of its intended action and after an impasse had been reached in the bargaining in which, the Board found, the Company had not failed to bargain in good faith.

Statutes Involved

National Labor Relations Act, Section 8(a)(5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a)(5):

> "Section 8(a). It shall be an unfair labor practice for an employer—
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

National Labor Relations Act, Section 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d):

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to

agree to a proposal or require the making of a concession: . . ."

Statement

This case arose out of negotiations in 1959 between the Company and the Union for new collective bargaining agreements covering units of hourly-paid and salaried employees at the Company's eight East Coast shipyards (three of which have since been closed), to replace 3-year agreements which were entered into in 1956 and which expired on July 31, 1959.*

The Board found that the Company was not guilty of bad faith bargaining and that it did not violate the Act by putting its contract proposals into effect after the bargaining had reached an impasse and the previous contracts had expired (88a-89a). The Board concluded, however, that during the course of those negotiations the Company committed *per se* violations of Section 8(a)(5) of the Act by insisting on a proposal that grievances be signed by individual employees (88a) and by temporarily suspending, after expiration of the prior agreements, certain Union benefits consisting of superseniority for Union officials and grievance handling privileges (91a-92a).

The jurisdiction of the court of appeals was invoked to enforce and review the decision of the Board under Sections 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

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*Two agreements were involved: one covering hourly-paid employees and the other covering salaried employees, the terms of the former forming the basis for negotiations with respect to the latter (31a). Inasmuch as the issues are virtually the same as to both units, except that the Company did not put into effect its proposals for the salaried employees, for purposes of simplicity the statements in this petition refer to the bargaining for hourly-paid employees unless otherwise specifically stated.

This petition seeks review of the decree of the court of appeals denying enforcement of the Board's order and remanding the case to the Board for further proceedings in accordance with that court's opinion. In its opinion, the court of appeals (i) concurred with the Board's findings of violations by the Company and (ii) further held in effect that, because of those violations, it was not legally permissible for the Company to put its contract proposals into effect after an impasse in bargaining had been reached.

Economics Underlying the 1959 Bargaining

The bargaining in 1959, which was preceded by a long history of bargaining and contractual relations between the parties (534a-535a), took place under extremely adverse economic conditions. Foreign competition, aided by lower overhead and labor costs in foreign shipyards, had drastically reduced the amount of business available to American shipyards (396a-398a; 409a; 411-412a; 422a-424a; 919a-926a). In addition, the Company was suffering from competitive disadvantages in relation to other American shipyards (419a-420a; 657a-686a), because the other yards had more favorable terms of employment under their collective bargaining agreements (205a; 226a-227a; 238a-239a; 676a-683a; 694a-698a; 726a-727a; 739a).

Presentation of Company and Union Proposals

The Union outlined its proposals to the Company on July 7, 1959 (106a-107a). The next day the Company presented to the Union its contract proposals, supported by a carefully prepared economic statement and accompanying charts (657a-743a).

The Company's proposals embodied extensive contract reforms designed to improve the Company's competitive position (686a-743a). The Trial Examiner found as to the Company's proposals that "there was plausible and reasonable basis for virtually each of them, and the economic aspects were more a matter of preventing future increases in costs than reductions of existing wage rates. Indeed, there was no proposal to reduce anyone's wages" (69a).*

The Company's proposals provided for continuation of the extensive program of Union privileges and benefits which had been provided for under the prior agreements, such as compulsory maintenance of union membership (768a-769a), checkoff of Union dues (769a-771a), superseniority for Union representatives (800a-802a), leaves of absence for Union officers (800a) and a complete grievance procedure, including arbitration (810-823a).

The Company emphasized that it was not demanding particular contract language and urged the Union to address itself to the substantive difficulties to which the proposals were directed (458a-459a; 742a).

The Union's Response

Without even waiting to discuss the Company's proposals in the bargaining sessions, the Union immediately called local union meetings at which the Union's

*Contrary to the statement of the court below (App. 3), the Company's proposal did not propose to eliminate the cost-of-living adjustment which had accrued to that date, but to prevent it from increasing in the future; nor did it propose any material reduction in premium pay rates or place material limitations on the scope of the arbitration clause or the grievance procedure. Most of the changes in the grievance procedure were designed to expedite the procedures and to increase, rather than reduce, their effectiveness.

officers and members of the negotiating committee attacked the Company's proposals and demanded their rejection by the membership (338a-340a; 344a; 884a; 885a-903a; 913a). At the next bargaining session, held on July 15, the Union rejected all the Company's proposals (108a), stating that, if the Company persisted in its proposals, "it was headed for one hell of a fight and a hideous one" (202a).

On that same day, July 15, the Union presented detailed written contract proposals which it had summarized orally to the Company on July 7 (541a-542a). Despite the depressed condition of the shipbuilding and ship repair industries and the Company's poor competitive position, the Union demanded substantially increased benefits in no less than twelve basic areas (744a-748a; 750a-752a; 757a). These the Company rejected on the ground that they would either (1) increase the cost of the Company's operations, (2) give rise to additional grievances or (3) intrude on management authority necessary for efficient operation (449a-450a).

The Subsequent Negotiations

After the meeting on July 15, the parties proceeded to a re-discussion, Article by Article, of the detailed contract changes proposed by each (450a). These discussions took place on July 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, August 1, 2 and 6 (166a-167a; 539a-540a). By August 6, they had come to a halt, the Union spokesmen having characterized them as "fruitless" (269a-270a).

During the meetings in July and August the Union failed to concede the justice of any of the Company's claims or to retract any of its own proposals for increases in costs and added interference with operational efficiency (194a; 346a-347a; 450a-451a).

Notification to the Union of the Suspension of Certain Union Privileges at the Expiration of the Prior Agreements

At a meeting on July 28, 1959, the Company notified the Union that on August 1, 1959, after expiration of the 1956 agreements, certain privileges which had been accorded to the Union under those agreements would be suspended. Those privileges, *all of which were provided for in the new agreements proposed by the Company* (see p. 6, *supra*), dealt with the relationship between the Company and the Union: compulsory Union membership, checkoff of Union dues and initiation fees, top seniority for Union officials, and formal grievance procedures and arbitration (542a-543a). The Company made clear, however, that it would continue to discuss grievances with Union representatives outside working hours (178a-179a; 277a-278a).

Subsequent Institution of Company Proposals

At a meeting on August 6, 1959, the Union stated that the negotiating procedures being followed were "fruitless" (269a-270a) and that it was "stupid" to continue to go over the proposals (156a). Despite the Company's urgent request for continuous sessions (848a-849a), the Union refused to meet between August 7 and 11 (159a-160a).

When the negotiations resumed on August 11, the Company stated its belief that the parties were at an impasse and that further delay in effectuation of the changes in terms and conditions of employment proposed by the Company could not be tolerated. Accordingly, the Union was notified that, effective August 13, the Company's proposals would, with certain stated exceptions, be put into effect (843a-847a). The em-

ployees continued to work under those terms and conditions of employment until the beginning of a strike in the latter part of January, 1960.

The parties met again on August 19 and several times during the months of September, October, November and January (272a-274a; 277a; 540a).

The Company's Grievance-Signing Proposal

The Company's contract proposals included a considerable number of revisions and refinements in the grievance procedure, in order to eliminate abuses and to make it more effective (including exclusive handling of grievances by Union representatives, shortening time limits for answering or appealing grievances, making grievance statements more explicit, filing of prehearing briefs with arbitrators, etc.) (810a-823a).

One proposal would have required that all grievances to be handled in the grievance procedure be signed by the employees involved (810a). Company representatives explained that this provision was needed in order to identify claimants (312a) and to prevent the grievance procedure from being misused as an instrument to harass the management.* In its explanation to the Union for the proposed changes in the grievance provisions, the Company stated (727a-729a):

> "We have changed the language of this Article substantially. Under our current agreement we have been flooded with grievances. The Union has openly stated that the grievance machinery would be and, in fact, has been used to harass the Management. The Union's Executive Secretary at Quincy has boasted that his Local has filed more

*Indicative of the harassment is the fact, as found by the Trial Examiner, that "there were about 800 grievances pending in the arbitration stage at the start of the bargaining period" (69a).

grievances than any other union in Massachusetts. This we can easily believe!

"The sheer volume of grievances places an almost prohibitively high cost for investigation on Management and upon investigation most of the grievances have been found to be without merit.

"...

"Obviously, a procedure that is subject to such wide abuse must be changed. When there are individuals who are not only willing to take advantage of such a procedure, but deliberately go out of their way to do so for the sole purpose of harassing Management, such a procedure becomes intolerable.

"...

"No grievance will be accepted in Step No. 1 unless it sets forth the facts upon which it is based and is signed by the aggrieved employee or employees. General statements covering any and every employee are out...."

The Union did not, before the negotiations reached an impasse, make any claim that the grievance-signing proposal was not a mandatory subject of bargaining or request that it be withdrawn on that ground.

Furthermore, that proposal was not the cause of, or a material contributing factor to, the impasse in bargaining. To the contrary, there is ample evidence to support the finding of the Trial Examiner that: "The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it" (75a).

Reasons For Granting The Writ

The decision below involves important questions of Federal law applicable to collective bargaining. It would result in unwarranted intrusion by the courts and the

Board into the parties' choice of contract proposals and bargaining tactics, matters which the Act leaves to the parties themselves. It would pervert the bargaining process into a game of legal chess, with emphasis on the avoidance of legal pitfalls rather than the resolution by agreement of the particular problems facing the employer and its employees. It would result in applying to employers different standards of conduct than this Court has applied to Unions. It involves serious misinterpretations of the Act and of decisions of this Court construing and applying the Act, and it is in conflict with decisions of this Court on related questions arising under the Act.

I.

THE HOLDING OF THE COURT BELOW THAT THE COMPANY COMMITTED AN UNFAIR LABOR PRACTICE BY ITS GRIEVANCE-SIGNING PROPOSAL IS CONTRARY TO THE ACT AND CONFLICTS WITH DECISIONS OF THIS COURT INTERPRETING AND APPLYING THE ACT.

In holding that the Company committed an unfair labor practice by its grievance-signing proposal, the court below relied on the decision of this Court in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958) (App. 7). In so doing, the court below misinterpreted and misapplied *Borg-Warner* with the result that serious questions are raised as to the scope of collective bargaining which warrant the attention of this Court.

Borg-Warner held that an unfair labor practice was committed by an employer in pressing a pre-strike bal-

lot proposal to impasse, because (1) the proposal was not a mandatory subject of bargaining—it did not deal with "wages, hours, and other terms and conditions of employment" but related "only to the procedure to be followed by the employees among themselves" and (2) the employer's refusal to sign any agreement without the proposed clause was such that it was tantamount to a refusal to enter into any agreement on mandatory subjects. Neither branch of that holding is applicable here.

1. The grievance-signing proposal was a mandatory subject of bargaining within the meaning of *Borg-Warner*, because it "regulates the relations between the employer and the employees." The employer is legitimately interested in the number and nature of grievances to be handled in the grievance procedure, and in protecting the process against abuse and making it available only in respect of matters of serious concern to employees. It is for this reason that employers and unions have traditionally negotiated and agreed on a wide variety of procedural details, including many that restrict a union's freedom of action, such as exclusion of some subjects entirely from the grievance procedure, placing stringent time limits on the filing and processing of grievances, limiting the number and location of union grievance representatives, prescribing who may attend grievance meetings and *requiring that employees sign grievances.*

The court below at one point agrees with the Board that "a grievance procedure" is within the statutory definition of bargaining and hence is a mandatory subject (App. 9). That finding is inconsistent with its conclusion that a grievance-signing requirement, which is a customary detail of such a procedure, is a non-manda-

tory subject. If collective bargaining is to have sufficient latitude and flexibility to permit the parties to accommodate the realities of industrial life in the agreement process, it is essential that the parties be free to bargain over details such as this.

Finally, there was no evidence in *Borg-Warner* that the pre-strike ballot clause was a normal and customary collective bargaining term, while here the evidence establishes that a requirement that employees sign grievances is a commonplace term in collective bargaining agreements throughout industry (926a-985a), including agreements between the Union and competitors of the Company (948a; 1017a-1018a). The weight to be accorded such evidence of common industrial practice was emphasized by this Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). In that case the Board held that the employer's insistence on a broad management rights clause was "in derogation of" the union's statutory bargaining rights. This Court, referring to evidence that management rights clauses are commonly included in collective bargaining agreements, reversed the Board, stating (p. 408):

> "... Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term 'bargain collectively' as used in the Act has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944)."

In concluding that the grievance-signing proposal was a non-mandatory subject of bargaining, therefore,

the court below misapplied, and the decision thereby conflicts with, *Borg-Warner* and *American National Insurance.*

2. But even if the Company's grievance-signing proposal was a non-mandatory subject, the Company's "insistence" on it was not tantamount to a refusal to enter into an agreement on mandatory subjects of bargaining. Although the Company did not withdraw this particular proposal before an impasse in the bargaining was reached, it is clear that the impasse was brought about by disagreement on many fundamental mandatory subjects of bargaining: "The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it" (75a); "A consistent refrain throughout the negotiations was the Union's unequivocal declaration that all the Company's demands were absolutely unacceptable" (61a). In the light of these findings, it is clear that the Company's grievance-signing proposal did not block agreement on mandatory subjects of bargaining and, therefore, the court below erred in applying *Borg-Warner.* In addition to that misapplication the decision below frustrates a basic philosophy of *Borg-Warner,* in that it deters the parties from bargaining about non-mandatory subjects which this Court expressly stated the parties are free to do, for bargaining without resolve is an empty gesture and under the lower court's decision bargaining with resolve would risk an 8(a)(5) violation.

3. Four Justices dissented in *Borg-Warner,* because of the "fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process" (*Borg-Warner,* at pp. 351-52). The then Professor Archibald Cox, in an analysis of this

Court's 1957-1958 labor decisions, expressed the same fear:

> "In my opinion it is both unsound and inconsistent with the basic philosophy of collective bargaining to license the NLRB and courts to determine the scope of effective contract negotiations."*

Professor Cox in his analysis observed that no longer would the interpretation of "wages, hours, and other terms and conditions of employment" only determine what subjects the parties must *discuss*, but, after *Borg-Warner*, will determine what subjects must be *excluded* from discussion. He further observed that the Board staff and judges did not possess the practical experience in industrial management and collective bargaining necessary to make such a determination. In addition, Professor Cox argued that by making that determination a matter of statutory interpretation a uniform rule would result, whereas the needs and practices of different industries required different rules. The dynamic nature of collective bargaining also requires more flexibility than could be achieved through the process of statutory interpretation.

Both the dissent and Professor Cox foresaw the potential for misapplication of *Borg-Warner*. Such misapplication, it was feared, would result in destruction of the philosophy of *American National Insurance, i.e.*, that practice in an industry should be respected by the Board and courts.

The misapplication of *Borg-Warner* here demonstrates that the fears of the dissenters and Professor

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*Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1083 (1958). *Accord*, Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 993-1006 (1961); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 NYU CONF. LAB. 39, 49-50 (1959).

Cox were well founded. The effect of the decision below will be to eliminate grievance-signing provisions from collective bargaining agreements, even in industries where such provisions are commonplace and under circumstances where it is necessary to protect the grievance machinery from undue burden and abuse. Before such a mischievous result becomes imbedded from a misreading of *Borg-Warner*, it should be made plain that *Borg-Warner* neither commands nor sanctions any such rigid limitations on the scope and development of the constantly evolving collective bargaining process.

II.

THE HOLDING OF THE COURT BELOW THAT THE TEMPORARY SUSPENSION OF SUPERSENIORITY AND CERTAIN GRIEVANCE FORMALITIES, AT THE EXPIRATION OF THE PRIOR AGREEMENTS, CONSTITUTED A *PER SE* VIOLATION OF SECTION 8(a)(5), CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court below found that the Company's temporary suspension on August 1, 1959, of superseniority for Union officials and certain grievance formalities, constituted a change in terms and conditions of employment which was governed by the rules concerning employer unilateral action. Without questioning the Board's finding that the Company acted in subjective good faith, the court purportedly applied the law of unilateral action and held the Company guilty of a *per se* violation of Section 8 (a) (5) (App. 9-10, 13). That hold-

ing misconstrues the nature of the Company's action and conflicts with this Court's decisions in *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); and *NLRB v. Katz*, 369 U.S. 736 (1962).

1. In *Insurance Agents'* the union, in order to put pressure on the employer, caused its members unilaterally to make drastic changes in their customary employment practices.* The Board contended that those actions amounted to a "unilateral setting of the terms and conditions of employment" and hence were violative of the union's duty to bargain in good faith (*Insurance Agents'* at pp. 496-97 n. 28). This Court, however, ruled that those changes were merely a form of temporary economic pressure, immune from Board control.

The Company's suspension of Union privileges on August 1 must, similarly, be treated as temporary economic pressure rather than as a unilateral setting of conditions of employment. These were essentially Union privileges and not employee benefits (42a-44a). Continuation of these privileges was at all times provided for in the Company's proposals (800a-801a; 810a-823a); full ... ivileges would have been restored upon signing the new agreements. Accordingly, there was really nothing to bargain about when the Company suspended them, unless it be whether the Company should apply this kind of pressure to the Union. It makes no more sense to require bargaining about such a matter than it would to require bargaining by a union about whether

*Refused to solicit new business; refused to report new business obtained; refused to participate in company sales campaign; reported late; refused to perform customary office duties; refused to attend business conferences arranged by the company. *Insurance Agents'* at p. 480.

it should go on strike or apply other forms of pressure to an employer.

The decision below is in serious conflict with the holding in *Insurance Agents'* that: (1) economic pressure is "part and parcel of the system" of collective bargaining, its use being perfectly consistent with good faith bargaining; and (2) the Board should not apply *per se* rules in determining the issue of good faitn bargaining.

2. But even assuming that the Company's August 1 changes constituted unilateral action and not economic pressure, the lower court's decision is then in conflict with *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); and *NLRB v. Katz*, 369 U.S. 736 (1962), for the reasons set forth under III below, and also for the reasons set forth hereunder.

The evidence is undisputed that at a bargaining session on July 28 the Company notified the Union that, after the expiration of the 1956 agreements, it would suspend the Union privileges on August 1, 1959 (542a-543a). That action was preceded by numerous bargaining sessions in which the Union had consistently refused to accede to any of the Company's proposals.* Negotiations continued over the next three days, July 29, 30 and 31 (539a-540a). The Union did not make any request that the Company bargain with it about the suspension of privileges and the Company did not refuse to discuss that subject with the Union.

The lower court, citing *Katz* and *Crompton-Highland Mills*, held that the Union was not given sufficient "bar-

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*As the Trial Examiner found, "A consistent refrain throughout the negotiations was the Union's unequivocal declaration that all the Company's demands were absolutely unacceptable." (61a).

gaining opportunity" to justify the Company's unilateral action. Those cases, however, do not support that holding.

In *Katz*, the employer took unilateral action "without first notifying or consulting the union" (*Katz*, 369 U.S. at p. 744). In holding that that action violated the employer's duty to bargain, the Court stated the rule as follows: "Unilateral action, by an employer *without prior discussion with the union* does amount to a refusal to negotiate about the affected conditions of employment under negotiations, and must of necessity obstruct bargaining, contrary to the congressional policy" [Emphasis added] (*Katz*, 369 U.S. at p. 747).

In *Crompton-Highland Mills*, where the issue was the desire of the employer to reach agreement with the union, the employer increased rates of pay "without prior consultation" with the bargaining representative, which this Court found justified an order of the Board requiring the employer "to cease and desist from refusing to bargain collectively by taking action, *without prior consultation with the authorized collective bargaining representative of the employees*, with respect to general rates of pay which are substantially different from, or greater than, any which the employer has proposed during its negotiations with such representative" [Emphasis added] (*Crompton*, 337 U.S. at p. 225).

Both *Katz* and *Crompton-Highland Mills* hinged on lack of notice to, or consultation with, the bargaining representative prior to the institution of the changes. In this case, there was prior notice to the Union and ample opportunity for it to bargain if it had so desired. The court below erred, therefore, in holding that the Company's action was violative of the rule enunciated by this Court in those decisions.

III.

THE HOLDING OF THE COURT BELOW THAT THE PUTTING INTO EFFECT OF THE COMPANY'S PROPOSALS ON AUGUST 13 CONSTITUTED A VIOLATION OF THE ACT, CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING EMPLOYER UNILATERAL ACTION AND INTRODUCES UNWORKABLE COMPLICATIONS INTO THE COLLECTIVE BARGAINING PROCESS.

The Company put its contract proposals into effect on August 13, (i) after giving the Union notice of its intended action (160a-161a; 843a-847a), (ii) after a lengthy period of bargaining (539a-540a), (iii) in which the Union had consistently refused to make any concessions (61a), (iv) after a complete impasse or deadlock in the negotiations had been reached (57a) and (v) after the prior agreements had expired (537a). The Board concluded that the Company's action did not violate the Act, because an impasse had been reached and the Company had bargained in good faith.* The contrary holding of the lower court is in basic conflict with the decisions of this Court in respect of bargaining and unilateral action.

Section 8(d) of the Act defines "bargain collectively" as "... the mutual obligation ... [1] to meet ... and confer [2] in good faith [3] with respect to wages, hours,

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*In fact, under the prevailing decisions an impasse is not necessary to justify unilateral action. Under *Katz* and *Crompton-Highland Mills*, all that is required is that the bargaining representative be given notice of and an opportunity to bargain about the proposed change, which requirement was fully satisfied in this case (see *NLRB v. Bradley Washfountain Co.*, 192 F. 2d 144 (7th Cir. 1951)).

and other terms and conditions of employment . . . ." In *Katz* this Court held that an employer is guilty of refusing to bargain collectively when, *without first notifying or consulting the union*, he unilaterally changes conditions of employment, regardless of his good faith, for if an employer refuses even [1] "to meet . . . and confer" the issue of [2] "good faith" is never reached.

Likewise, in *Borg-Warner*, this Court held that an employer could be found guilty of refusing to bargain, *regardless of his good faith*, where he in effect refused to bargain over the mandatory subjects, *i.e.*, [3] "with respect to wages, hours, and other terms and conditions of employment . . . ."

No contention is, or could be, made that the Union was not notified and given full opportunity to bargain over the changes proposed by the Company. Nor is the issue of mandatory bargaining subjects relevant to a determination of this aspect of the case. The issue, then, is the [2] "good faith" of the Company as evidenced by the totality of its conduct.

The Trial Examiner and the Board both found that the Company was not guilty of bad faith bargaining (75a, 88a-89a). The Board expressly took into account what it regarded to be the Company's violations in connection with its grievance-signing proposal and its suspension of Union privileges at the expiration of the prior contracts, but concluded that "considering the totality of Respondent's conduct we are unable to conclude from the present record that Respondent did not honestly endeavor to reach an agreement in its negotiations with the Union" (88a-89a). Under the rule applied by this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Board's finding on this issue is conclusive, because there is ample evidence

in the record to support it.

The court below, however, asserted that it was not necessary for it to consider whether the Board erred in finding that the Company did not bargain in bad faith, because it held *as a matter of law* that the Company was not legally justified in taking unilateral action on August 13, on account of the two preceding violations (App. 11). That, of course, was just a way of paying lip service to the Board's unassailable finding of good faith, while proceeding to ignore it and to substitute the court's view for the Board's conclusion. This holding thus calls for review by this Court, not only because it invades the province of the Board on matters of fact, but particularly because it conflicts with the policy of this Court against the application of *per se* rules in determining whether good faith bargaining has taken place.

In *Insurance Agents'* (361 U.S. 477), this Court reversed a Board finding that a union was guilty as a matter of law of violating Section 8(b)(3) because during negotiations it had caused its members to engage in harassing tactics* designed to put economic pressure on the employer, although the Board also found that the union "conferred in good faith for the purpose and with the desire of reaching an agreement with [the employer] on a contract" (*Insurance Agents'*, at p. 480). Justice Frankfurter, writing a separate opinion in which Justices Harlan and Whittaker concurred, made clear why it is improper for the Board to apply *per se* rules in determining good faith bargaining (*Insurance Agents'*, at pp. 508-10).

In *Crompton-Highland Mills* (337 U.S. 217), where the employer unilaterally put into effect an increase in wages substantially greater than any offered to the

*See note on p. 17, *supra*.

union during negotiations, this Court upheld the Board's factual inference that the employer did not bargain in good faith. But, as explained by Justice Frankfurter in *Insurance Agents'* (p. 509):

> "The *Crompton-Highland* decision rested not on approval of a *per se* rule that unilateral changes of the conditions of employment by an employer during bargaining constitute a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without consulting the union. . . ." (See also *Katz* at pp. 743; n. 11, and 745.)

Thus, *Crompton-Highland Mills* and *Insurance Agents'* requires the Board, in approaching a case involving unilateral action, to determine whether such action, together with all the other facts in the case, compels the factual inference that the employer was not bargaining in good faith. Here the Board made its determination in favor of the Company, and the lower court erred in applying a *per se* rule of law to avoid the Board's finding of good faith bargaining.

Neither the Act, nor the decisions of this Court construing the Act, warrant (a) conditioning privilege of unilateral action upon lack of prior violations, or (b) imposing upon an employer an additional penalty for such violations in the form of disqualifying it from taking unilateral action. Under the decisions of this Court, unilateral action, without prior consultation with the union, is violative of the Act, because it frustrates the statutory objective of establishing working conditions through bargaining (*Katz*, at pp. 743, 747). Where, as here, the union has been given notice and opportunity for bargaining and agreement can not be reached due to

disagreement over bargainable subjects, unilateral action is permissible, because under those conditions it does not signify a lack of desire to reach agreement. See, *e.g.*, *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); *Quaker State Oil Refining Corp.*, 107 N.L.R.B. 34 (1953); *Morand Brothers Beverage Co.*, 99 N.L.R.B. 1448, 1465 (1952); *W. W. Cross & Company, Inc.*, 77 N.L.R.B. 1162 (1948); *Exposition Cotton Mills Co.*, 76 N.L.R.B. 1289 (1948).

The lower court's decision, if upheld, would convert the bargaining process from an instrument of free and open discussion of the particular problems facing the parties, into a game of legal chess, with emphasis on legal technicalities rather than matters of substance. This case perfectly illustrates the point. Here an employer, with a long history of contractual relations with the Union and motivated by economic necessity, endeavored to obtain contract reforms as to which the Trial Examiner found that "there was plausible and reasonable basis for virtually each of them" (69a). It engaged in detailed explanation and discussion of the reasons for its proposals, and was met with "the Union's fixed and stony inflexibility" (75a). Failing agreement and after loss of the Union's no-strike commitment at the expiration of the prior agreements, its only recourse was, first, to put economic pressure on the Union by suspending certain Union privileges and, finally, to put its proposals into effect without the Union's agreement.

The Board, passing judgment on the Company's proposals, decreed that one (a very minor matter in the bargaining and which did not materially affect the impasse) was not a mandatory subject of bargaining, and also held that the Company was not privileged to suspend two union benefits at the expiration of the prior

agreements. It has been pointed out in I and II, above, that there are serious questions as to whether the Company violated the Act in either respect. At most, the violations found by the Board were not serious, as is implicit in the Board's finding that the Company did not bargain in bad faith. Nevertheless, the lower court embroidered on these asserted violations to hold that, as a matter of law, they tainted the Company's subsequent unilateral action in putting its proposals into effect.* This holding is not only based on a major distortion of the record, but, more importantly, it ignores the Board's finding of good faith and converts what in reality was a sincere and legitimate effort by the employer to solve pressing industrial problems by the voluntary agreement process, as envisioned in the Act, into a tangle of statutory violations. It is this serious and unwarranted interference with the collective bargaining process, as well as the failure to give proper regard to the Board's finding of good faith, which deserves the attention and action of this Court.

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*Not only did the court below mistakenly apply a *per se* rule of law to circumvent the Board's finding of good faith on the part of the Company, but in an apparent effort to buttress its conclusion that the Company was disqualified from putting its contract proposals into effect on August 13, because of the asserted two prior statutory violations, the court below sought to link the impasse with those violations, asserting that the Union's adament rejection of the Company's proposals was "completely justified" in view of "the company's unlawful insistence on its grievance-signatory plan and its unilateral alteration of the conditions of employment on August 1st" (App. 13). That assertion is wholly unsupported by the evidence. The record is indisputably clear that the Union took an irreconcilable position with respect to the Company's proposals from the very beginning of negotiations, long before any of the alleged violations occurred, and it maintained that position consistently throughout the negotiations (55a-57a; 74a-75a). There is not the slightest evidentiary support for the conclusion that the opposition of the Union was in any material respect caused or affected by the alleged violations. Instead, the record completely supports the Trial Examiner's finding that "this was fundamentally an economic disagreement" (74a).

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 1963.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,052

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Intervenor.

ON PETITION TO REVIEW AND MODIFY AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 14,102

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION TO REVIEW AND MODIFY AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued May 21, 1963
Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT
(Filed July 30, 1963)

By STALEY, *Circuit Judge.*

The National Labor Relations Board has found that the Bethlehem Steel Company (Shipbuilding Division) violated §8(a)(5) and (1) of the National Labor Relations Act.[1] The case is here on petitions for review filed by both the company and the charging union, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and on the cross-petition of the Board for enforcement of its order. The employer asserts that the Board's findings are unwarranted, while the union contends that the Board should have found additional violations.

The circumstances giving rise to this proceeding occurred during the summer of 1959 when Bethlehem and the union were negotiating a new collective bargaining agreement to cover hourly-paid employees at the company's east coast shipyards.[2] A prior agreement, executed in 1956, had an expiration date of July 31, 1959. The union made an oral presentation of its bargaining demands on July 7, 1959. These included, among others, a proposed change in the formula for adjusting wages to the cost of living, increases in premium pay and vacation benefits, an extension of the scope of the arbitration clause, and changes which would give an increased em-

[1] "§ 158. Unfair labor practices.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C.A. § 158.

[2] Negotiations covering salaried employees were also being conducted at this time, but since these were largely contingent upon the discussions concerning the hourly-paid employees, we shall concern ourselves only with the hourly-paid unit.

phasis to seniority in determining layoffs. The following day the company presented its proposed new contract (described as the White Book in the record), together with a written statement explaining its position. This detailed plan included elimination of the cost of living adjustment, a reduction in premium pay, limitations on the scope of the arbitration clause, and alterations in the grievance procedure. The latter contained a clause requiring the signature of each employee involved before a grievance could be processed. The reason assigned for this was that "under our current agreement we have been flooded with grievances." The thrust of the company's explanatory statement was that competitive conditions necessitated these proposals. Discussion of the basic wage structure was postponed pending resolution of these issues.

The parties conferred frequently during the next few weeks but there was little progress in the bargaining. The company stressed the economic cost of the union's proposals, while the latter rejected this argument on the ground that the employer was not in a competitive business to any substantial degree. On July 28, 1959, Bethlehem informed the union that if no agreement were reached by July 31 (the termination date of the 1956 contract), it would discontinue the grievance and arbitration procedure provided for in the old contract, would no longer give preferential seniority to union representatives, and would not comply with the union shop and checkoff clauses. Since no agreement was reached by August 1st, this was done.

On August 11, the company informed the union and the employees that it was putting into effect all of its White Book proposals with respect to the hourly-paid unit, except, inter alia, those relating to arbitration,

preferential seniority, and the union shop and checkoff. This plan was effectuated August 13, 1959. A strike followed in January 1960, and was still in existence at the time of the hearing before the trial examiner in March of that year.

The trial examiner found that Bethlehem had violated §8(a)(5) and (1) by insisting on the clause requiring the signature of individual employees on grievances. However, he concluded that none of the other acts of the company were unlawful, and further determined that the employer was not guilty of subjective bad faith in its course of conduct throughout the negotiations. The unilateral changes of August 13 were held not to constitute an unfair labor practice because the parties by this time had reached an impasse in bargaining.

Initially, the Board adopted the conclusions and recommendations of the trial examiner. 133 N.L.R.B. 1347 (1961). However, in a supplemental decision, 136 N.L.R.B. 1500 (1962), it found that the company had also violated § 8(a)(5) by depriving union representatives of their seniority rights and by unilaterally abandoning the grievance procedure of the expired contract and substituting its own procedure in lieu thereof. The Board adhered to its prior conclusion that the totality of Bethlehem's conduct did not evince bad faith bargaining.

At the threshold, Bethlehem urges that it was relieved of any obligation to bargain with the union because the latter's demands covered an inappropriate unit, i.e., one which included personnel classifiable as supervisors, and thus not within the purview of the statute. See 29 U.S.C.A. §152(3). This challenge relates to the union's proposal that the bargaining unit include both hourly-paid and salaried "snappers". The parties had agreed in the 1956 contract that the former should be included

and the latter excluded. Bethlehem now asserts that both are supervisors.

[1] We agree, as did the Board, with the trial examiner that "this is more an apparent than a real issue in this case," and that "placement of the snappers could in no event affect any of the issues raised by the complaint." Indeed, as the examiner noted, "The Respondent [Bethlehem] also conceded that whether the snappers in question be included in the bargaining unit or excluded, in either event the Union in fact represented a majority of the employees at all times, as it does now." In these circumstances, we think the employer's position is not tenable. *Brewery & Beverage Drivers Local 67 v. NLRB*, 103 U.S. App. D.C. 190, 257 F.2d 194 (1958).

Bethlehem's more fundamental contentions are that its grievance-signatory plan, and its discontinuance of preferential seniority for union officials and abandonment of the grievance and arbitration machinery at the expiration of the 1956 agreement did not violate the statute.

With respect to the grievance-signatory plan, the company advances two arguments: (1) there is no evidence that this was made a condition of reaching agreement; and (2) the proposal is a mandatory subject of bargaining. The record and the findings of the trial examiner make it abundantly clear that Bethlehem vigorously insisted that the substance of this proposal be incorporated in any new labor contract. But the employer urges that at no time did it state this was a *sine qua non* of agreement. It says that since, as hereinafter more fully discussed, the Board found that there was an impasse on all disputed matters, it could not have concluded that insistence on this particular clause barred an accord.

[2, 3] The argument does not withstand analysis. It was not necessary for the Board to find that the company's insistence on this proposal was the sole cause of the failure to reach agreement. If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958); *NLRB v. Davison*, 318 F.2d 550 (C.A. 4, 1963). Any other rule would permit insistence upon a non-mandatory item so long as there were any dispute as to mandatory topics. As the Supreme Court held in *Borg-Warner*, 356 U.S. at 349, 78 S. Ct. at 722:

> "We agree with the Board that such conduct [insistence on a non-mandatory topic] is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."

[4] We turn now to the second aspect of the employer's argument on this point, i.e., the proposal is a mandatory bargaining subject. In accordance with § 8(d) of the Act,[3] the Supreme Court has defined mandatory subjects as those within the phrase "wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *NLRB v. Wooster Division of Borg-Warner Corp.*, supra. It is clear to us that Bethlehem's proposal does not come within the scope of that phrase. Although at first glance it might appear to be a "condition of employment," actually the effect of the proposal is to limit

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[3] "§ 158. Unfair labor practices

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." 29 U.S.C.A. § 158.

the union's representation of the employees and not to condition the employees' employment. Cf. *NLRB v. Davison*, supra.

Under § 9(a) the union is the exclusive representative of the employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 28 U.S.C.A. § 159(a). Bethlehem's proposal which would restrict the union's role in the prosecution of grievances to those complaints which had been signed by individual employees clearly limits this representation. The company acknowledges the union's rights with respect to the prosecution of grievances, but seeks solace in the proviso of § 9(a) which grants individual employees the right to adjust grievances without the intervention of the representative so long as the adjustment is not inconsistent with the collective bargaining contract.

[5] We find nothing in this section to support the company's position. Indeed, the proviso itself requires that the union be given opportunity to be present at the adjustment. In short, the fact that individual employees have the right to adjust their own grievances does not mean that an employer can restrict the union's statutory rights by requiring that each grievance be signed by the employee involved. Such a limitation is not within the statutory definition of mandatory bargaining subjects. Like the pre-strike ballot clause in *Borg-Warner*, "it substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representatives." 356 U.S. at 350, 78 S. Ct. at 723. As the Board cogently points out in its brief, such a clause would pre-

clude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer reprisals, or for similar reasons, chose not to sign a grievance. Hence, redress for a violation would be made contingent upon the intrepidity of the individual employee.

[6] The fact that there are other labor contracts in this industry requiring employee signatures on grievances is not significant. Non-mandatory subjects may lawfully be included in collective bargaining contracts if the parties agree to them. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. at 349, 78 S. Ct. at 722. Bethlehem's reliance on *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), aff'd, 327 U.S. 661, 66 S. Ct. 721, 90 L. Ed. 928 (1946), is misplaced. That case simply holds that a bargaining representative can compromise accrued monetary claims of individual employees only if the employees have authorized it to do so.

[7] The Board concluded that Bethlehem did not violate the statute when, upon the expiration of the 1956 agreement, it discontinued enforcement of the union shop and checkoff. In this court the union does not seriously press its contention that this was error. In any event, we agree with the reasoning of the Board. The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in § 8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law. Cf. *NLRB v. International Union, United Automobile Workers*, 297 F.2d 272 (C.A. 1, 1961); *Communications Workers v. NLRB*, 215 F.2d

835, 839 (C.A. 2, 1954). Moreover, the checkoff clause of the 1956 contract expressly provided that it should remain in effect only so long as the agreement was extant.

Bethlehem makes a tripartite challenge to the Board's determination that the company violated § 8(a)(5) by unilaterally abrogating the preferential seniority rights of union representatives and by altering the prior grievance procedure. It urges that its action was a legitimate use of economic pressure, that these matters are not mandatory bargaining subjects, and that they, like the union shop and checkoff provisions, cannot be enforced unless there is an agreement in effect.

Clearly, the first argument is contingent upon the validity of the second, i.e., whether the company made a permissible use of economic weapons depends upon whether these matters are mandatory bargaining subjects, and thus not subject to unilateral change.

[8-10] We agree with the Board that both seniority rights and a grievance procedure are within the phrase "wages, hours, and other terms and conditions of employment" and hence are mandatory bargaining subjects.[4] *NLRB v. Proof Co.*, 242 F.2d 560 (C.A. 7, 1957) (seniority); *NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84 (C.A. 2, 1953) (grievance procedure and seniority). See also, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-337, 73 S. Ct. 681, 97 L. Ed. 1048 (1953); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 528, 69 S. Ct. 1287, 93 L. Ed. 1513 (1949); Annot. 12 A.L.R.2d 265, 272-273. Accordingly, the company's unilateral action with respect

[4]The Board properly rejected the examiner's holding that these topics though mandatory bargaining subjects, are not terms and conditions of employment. As we have previously indicated, the latter is merely a part of the statutory definition of the former.

to them was unlawful. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). The fact that there was no agreement in effect at the time does not alter our conclusion. As we have previously stated, Bethlehem was justified in discontinuing enforcement of the union shop and checkoff because these conditions are wholly dependent upon the existence of an agreement conforming to the § 8(a)(3) proviso. The company's abrogation of seniority rights and its alteration in the grievance and arbitration procedure, however, finds no such protection in the statute. The vice in this was not the refusal to comply with the provisions of an agreement which had already expired, but the unilateral elimination of accrued seniority rights, and the substitution of a new employer-devised grievance procedure in lieu of the one which existed under the expired contract.

[11] Two additional contentions of the employer merit only brief comment. It is said that because the union was given notice of these proposed changes and an opportunity to bargain with respect thereto, Bethlehem was justified in implementing them on August 1st. But the employer concedes that it was not until July 28 that the union was notified that these changes were to be effected only three days later. Until that time the company's own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); and *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 69 S. Ct. 960, 93 L. Ed. 1320 (1949). Similarly wanting in merit is the argument that the changes were permissible because "purely temporary and not for the purpose of effecting a permanent change in terms of employment, but for the purpose of putting

legitimate economic pressure on the Union." Regardless of how characterized, the changes altered conditions of employment and were therefore unlawful.

The union urges that the company's unilateral imposition of the White Book on August 13, 1959, constituted a per se violation of § 8(a)(5). Additionally it makes a broad frontal attack on the failure of the Board to find Bethlehem guilty of bad faith bargaining during the entire course of the 1959 negotiations. Because we hold that the Board's determination that Bethlehem was legally justified in imposing its own terms and conditions of employment on August 13 was premised on an erroneous view of the law, we find it unnecessary to consider the union's alternative argument.

[12, 13] The Board concedes that the employer's action of August 13 would ordinarily constitute a violation of the Act as a matter of law. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 69 S. Ct. 960, 93 L. Ed. 1320 (1949); *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145 (1945); *Quaker State Oil Refining Corp. v. NLRB*, 270 F.2d 40, 45-46 (C.A. 3), cert. denied, 361 U.S. 917, 80 S. Ct. 261, 4 L. Ed. 2d 185 (1959); *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 38 (C.A. 3, 1941). It urges, however, that the parties by this time had reached a bargaining impasse, thereby justifying unilateral action.[5] But it is manifest that there can be no legally

[5] In addition to contesting the Board's finding on this score, the union argues that the necessary inference in it is that the impasse arose between August 1 and August 11. The basis for this is that if there were a bona fide impasse prior to August 1, the Board could not have found that Bethlehem violated the Act by its actions on that date. In its brief the Board questions this rationale, but at oral argument counsel for the Board was unable to state at what point the impasse occurred. Because of our decision, we find it unnecessary to determine this issue. We might note, however, that logic supports the union's position.

cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action,[6] if a cause of the deadlock is the failure of one of the parties to bargain in good faith. *NLRB v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 529-530 (C.A. 9, 1963); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 234 (C.A. 5, 1960); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 136 (C.A. 9, 1949); *Vanneette Hosiery Mills*, 114 N.L.R.B. 1107, 1126 (1955). See also, *NLRB v. Crompton-Highland Mills, Inc.*, supra, and Bowman, An Employer's Unilateral Action—An Unfair Labor Practice?, 9 Vand. L. Rev. 487, 501 (1955-1956). Here, the company was guilty of acts which the Board forcefully contends, and we have held, to be a violation of its duty to bargain less than two weeks before the August 13 changes. Not only was this prior action unlawful, but it consisted of the very conduct, a unilateral alteration in the conditions of employment, which the Board now asserts was justified on August 13.

The sole reason advanced for the finding of an impasse is that the union had also adopted an attitude of "fixed and stoney inflexibility" and that, "[a]s the days wore on, adamancy only became stronger and stronger." In the words of the trial examiner:

> "With this sort of testimony by the Union witnesses themselves, and the complete failure to reach agreement on anything worth speaking about after all these negotiating sessions, there is no doubt that the parties were finished with talking. They were at an absolute impasse."

But it is not contended that the union's adamant position was in any sense a violation of its duty to bargain.

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[6] Although the parties have used the term *impasse* rather loosely to describe any deadlock in negotiations, regardless of how caused, we shall employ it in this opinion only in this strict legal sense.

Indeed, in view of the company's unlawful insistence on its grievance-signatory plan and its unilateral alteration of the conditions of employment on August 1st, the union's position was completely justified. In this regard, our decision in *NLRB v. International Ladies' Garment Workers' Union*, 274 F.2d 376, 78 A.L.R. 2d 963 (C.A. 3, 1960), is particularly apposite. We there held that a union was justified not merely in maintaining an adamant position at the bargaining table, but in refusing to negotiate with a representative of an employer's association who had previously held union office. Thus the Board in this case failed to view the union's inflexible position and the August 13 imposition of the White Book in the light of the company's prior violations of its duty to bargain.

Despite its determination that the company's action of August 1st was so inimical to our national labor relations policy as to constitute a per se violation of the Act, the Board now contends that this was only a "technical violation." But such a euphemistic description cannot be so easily employed to reconcile the inconsistency in logic in the Board's decision. The fact remains that the August 1st changes were unfair labor practices as a matter of law. Moreover, not only had the company not purged itself of its earlier violations by the time it implemented the White Book on August 13, but it concedes, and the record shows, that it did not institute its new grievance plan until that very day.

There are additional factors which conclusively refute the Board's contention, pressed at oral argument, that the "technical" violations of August 1st were innocently committed. In a prior case the Board held that Bethlehem had violated § 8(a)(5) in 1947 by insisting on a proposal which would give each employee the right to take up a grievance with his foreman without the un-

ion steward being present. In the Matter of Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341, (1950), reversed on other grounds, 191 F.2d 340, (D.C. Cir. 1951). A stipulation of the parties reveals that in 1956 the company suspended the seniority rights of union officials as well as the procedure for the adjustment of grievances. The union thereupon filed unfair labor practice charges. When a new contract was executed these charges were withdrawn pursuant to a memorandum of agreement. Considering the similarity between its prior conduct and that presented here, it cannot be said that the company was unaware of the questionable nature of its action.

The Board cites *NLRB v. Katz*, 369 U.S. 736, 741-742, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), for the proposition that whether an impasse exists is a question of fact for its determination. Certainly whether the parties have reached a deadlock in negotiations is a factual matter, but whether such a deadlock legally justifies a unilateral alteration in the conditions of employment is at the very least a mixed question of law and fact.

The union urges that we direct the Board to include in its order a "back pay" award to those employees who were injured by the company's action. However, because we hold only that the Board erred in law in failing to give proper consideration to the circumstances, particularly the unfair labor practices, which preceded the imposition of the White Book, we shall remand the case for further consideration in the light of this opinion. Of course, this is to include the issuance of an order which will effectuate the policies of the Act.

The petition for enforcement will be denied and the cause remanded for further proceedings in conformity with this opinion.

APPENDIX B

Decree Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,052

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Intervenor.

No. 14,102

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Intervenor.

DECREE

Before:

STALEY, HASTIE and SMITH, CIRCUIT JUDGES.

THIS CAUSE came on to be heard upon petitions to review, and upon cross-petition for enforcement of, a certain order of the National Labor Relations Board issued by it against Bethlehem Steel Company (Shipbuilding Division), its officers, agents, successors, and assigns, on April 25, 1962. The Court heard argument of respective counsel on May 21, 1963, and has considered the briefs and transcript of record filed in this cause. On July 30, 1963, the Court, being fully advised in the premises, handed down its opinion denying enforcement of the Board's order and remanding the case to the Board for further proceedings in conformity with the Court's opinion.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that enforcement of the said order of the National Labor Relations Board directed against Bethlehem Steel Company (Shipbuilding Division), its officers, agents, successors, and assigns, be and it hereby is denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that this cause be remanded to the National Labor Relations Board for further proceedings consistent with the Court's said opinion.

BY THE COURT

STALEY

Circuit Judge

Dated: August 21, 1963